IN THE

Supreme Court of the United States

OCTOBER TERM—1976

No. 76-58

SAMUEL H. SLOAN and SAMUEL H. SLOAN & CO.,
Petitioners,

—against—

SECURITIES AND EXCHANGE COMMISSION, UNITED STATES OF AMERICA as the SECURITIES AND EXCHANGE COMMISSION, NATIONAL QUOTATION BUREAU, INC., BUNKER RAMO CORPORATION, NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DISCLOSURE, INC. and NATIONAL CLEARING CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT NATIONAL QUOTATION BUREAU, INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Opinions Below

The opinions of the United States District Court for the Southern District of New York dismissing the amended

complaint and denying petitioners' motions, and of the United States Court of Appeals for the Second Circuit unanimously affirming the dismissal of the amended complaint and denial of petitioners' motions, are set forth at Appendices D and A, respectively, of the Petition herein and shall not be repeated here.

Questions Presented

Petitioners do not accurately set forth the questions presented. The actual questions presented are:

1. Should the Supreme Court grant the Petition to review the decisions by the courts below dismissing the amended complaint against National Quotation Bureau, Inc. for alleged violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act where National Quotation Bureau, Inc. publishes and sells price quotations of securities traded on the over-the-counter market:

   (a) in competition with other stock quotation services;

   (b) without ever requiring subscribers to deal exclusively with it and refrain from dealing with other stock quotation services; and

   (c) within the guidelines and regulations promulgated by the S.E.C.?

2. Should the Supreme Court grant the Petition to review the decisions by the courts below dismissing the amended complaint against National Quotation Bureau, Inc. for alleged violations of the antifraud provisions of the common law and federal securities laws, particularly Rule 10b-5, based upon its alleged cooperation with the

S.E.C. and refusal to permit petitioners to list markets in its stock quotation service?

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . .
>
> Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, . . ."

Section 2 of the Sherman Act, 15 U.S.C. § 2:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, . . ."

Section 3 of the Clayton Act, 15 U.S.C. § 14:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon,

such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b):

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5, 17 C.F.R. § 240.10b-5:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary

of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
in connection with the purchase or sale of any security."

Statement of the Case

The Petition herein seeks review of the decisions of the United States District Court for the Southern District of New York dismissing the amended complaint without leave to replead* and denying petitioners' motions, and of the United States Court of Appeals for the Second Circuit unanimously affirming the same.

The amended complaint asserts five counts. Counts I and II are directed against the S.E.C., seeking declaratory relief that the Securities Exchange Act of 1934 and the rules and regulations promulgated thereunder are unconstitutional, and damages resulting from certain alleged acts of the S.E.C. Count III alleges that National Quotation Bureau, Inc. ("NQB"), and other private party defendants, violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. Count IV alleges that NQB, and other private party defendants, violated the antifraud provisions of the common law and federal securities laws, particularly Rule 10b-5. Finally, Count V seeks declaratory relief that petitioners do not owe NQB the amount previously paid pursuant to petitioners' bill with NQB.

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* The District Court granted the motion by National Quotation Bureau, Inc. pursuant to Rule 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings.

The decisions below are clearly correct on the merits, and in any event raise no question which calls for review by this Court. As further set forth below, the District Court's decision, and the unanimous affirmance by the Court of Appeals, are not in conflict with the applicable decisions of this Court or other courts of appeals on the same matter. Indeed, the District Court concluded that the claim asserted by the amended complaint against NQB was "patently frivolous" (Petition, Appendix D, page 17a), and the Court of Appeals cautioned petitioners that it may be appropriate to assess penalities against them "if the same arguments which we have dismissed as frivolous are put before us again in the future" (Petition, Appendix A, page 5a).

Under Rule 19 of the rules of this Court, the Petition should be denied since petitioners have made no showing, nor could there be any showing, of "special and important reasons" which call for this Court to review the decisions below.

REASONS WHY THE WRIT SHOULD BE DENIED

POINT I

The courts below correctly dismissed the allegations respecting antitrust violations.

Count III of the amended complaint alleges that NQB violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act because NQB "operates a monopoly" by publishing stock quotations known as the "pink sheets" (Petition, page 14) (A61-63).*

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* Pages in the Joint Appendix in the Court of Appeals will be cited in this matter.

As set forth in the undisputed affidavit of NQB's Executive Vice President David Burnett (A149-151) submitted in support of NQB's motion to dismiss the amended complaint, "Since 1971 the National Association of Securities Dealers has provided electronic automated Over-the-Counter quotations to broker-dealers" in competition with the stock quotation services published and sold by NQB (A149-150). The Burnett affidavit points out that the subscription rate to NQB's daily stock quotation service is $60 per month for each subscription (A150-151), which is charged uniformly to all broker-dealers. As further set forth in the Burnett affidavit, "At no time has NQB ever required its subscribers to deal exclusively with it in supplying or receiving Over-the-Counter securities quotations" (A151).

The court below correctly dismissed the petitioners' claims against NQB for alleged antitrust violations. It is well settled by decisions of this Court that the offense of "actual monopolization" under Section 2 of the Sherman Act, the claim which petitioners assert here (Petition, page 14), requires the existence of monopoly power in the relevant market, together with an intent and purpose to exercise that power. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-1 (1966); *United States* v. *du-Pont & Co.*, 351 U.S. 377, 389-391 (1956); *United States* v. *Griffith*, 334 U.S. 100, 107 (1948). Here, there is, however, no allegation, nor could there be, that NQB has monopoly power within the meaning of Section 2; that is, as this Court has said, the power to fix prices in, or to exclude competition from, the relevant market.* *American Tobacco* v. *United States*, 328 U.S. 781,

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* The amended complaint makes no effort to allege an attempt to monopolize under Section 2, which requires the existence of a specific intent to control prices in, or exclude competition from, a rele-

(Footnote continued on following page)

811 (1946); *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 429-432 (2d Cir. 1945); *Albert H. Cayne Equip. Corp.* v. *Union Asbestos & Rubber Co.*, 220 F. Supp. 784, 788 (S.D.N.Y. 1963).

Indeed, as held by the court in granting a motion to dismiss the complaint in *Karlinsky* v. *New York Racing Association, Inc.*, 310 F. Supp. 937, 940 (S.D.N.Y. 1970), "plaintiffs, on their claim for monopolization under § 2 of the Sherman Act, never allege a relevant market, the activity monopolized or defendants' control of the market. All three allegations are necessary for a proper claim of monopolization [citations omitted] . . ." Accordingly, the courts below properly dismissed petitioners' amended complaint for failure to make the necessary showing of a Section 2 violation, that is, to allege a relevant market, the activity monopolized and control of the market.

Similarly, the courts below correctly dismissed petitioners' claim that NQB violated Section 3 of the Clayton Act. The record is undisputed that NQB has never "required its subscribers to deal exclusively with it in supplying or receiving Over-the-Counter securities quotations" (A151). This fact, which petitioners concede (A39), is particularly significant since, as this Court has said, the gravamen of a violation of Section 3 of the Clayton Act

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(Footnote continued from preceding page)

vant market. *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 626 (1953); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 431-2 (2d Cir. 1945). Courts have uniformly dismissed allegations respecting a Section 2 violation based upon an attempt to monopolize unless plaintiffs make "some affirmative showing of conduct from which a wrongful intent can be inferred." *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 284 F.2d 582, 584 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961); *United States* v. *Chas. Pfizer & Co.*, 245 F. Supp. 737, 739 (E.D.N.Y. 1965).

is the forbidden "condition, agreement, or understanding" of exclusivity, that is, that the purchaser shall not deal in the goods of a competitor of the seller. *Tampa Electric Co.* v. *Nashville Co.*, 365 U.S. 320, 329-330 (1961); *International Business Machines Corp.* v. *United States*, 298 U.S. 131, 137 (1936); *McElhenney Co.* v. *Western Auto Supply Co.*, 269 F.2d 332, 338 (4th Cir. 1959).

In conclusion, the courts below, in accordance with the decisions of this Court and other courts of appeals, correctly dismissed the alleged antitrust violations by NQB.

POINT II

The courts below correctly dismissed the allegations respecting securities law and common law fraud.

The courts below correctly dismissed Count IV of the amended complaint which alleges federal securities law and common law fraud. The district court characterized this part of the amended complaint as a "particularly irrational claim against certain defendants" (Petition, Appendix D, page 17a).

Petitioners' allegations of fraud (Petition, page 15) are obviously conclusory in nature and accordingly fail to comply with Rule 9(b) of the Federal Rules of Civil Procedure which provides that "In all averments of fraud . . ., the circumstances constituting fraud . . . shall be stated with particularity." *See, e.g., Shemtob* v. *Shearson, Hammill & Co.*, 448 F.2d 442, 444 (2d Cir. 1971). The courts below correctly applied the relevant law in dismissing the allegations of securities law and common law fraud since they are wholly conclusory and fail to show that any fraud or deception was committed in connection with any misrepresentation or omission by any defendant.

Further, petitioners do not begin to make the slightest showing of a violation of Rule 10b-5. There are no allegations, nor could there be, as required by Rule 10b-5, of fraud or deception by NQB "in connection with the purchase or sale of any security." Indeed, there are no allegations that NQB misrepresented or failed to disclose any material fact to petitioners, *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1301-1302 (2d Cir. 1973), with the requisite fraudulent intent or scienter, *Lanza* v. *Drexel & Co.*, 479 F.2d 1277, 1301-1305 (2d Cir. 1973). Further, petitioners made no showing, nor could they, that they relied to their detriment upon any alleged misrepresentation or omission by NQB, *List* v. *Fashion Park, Inc.*, 340 F.2d 457, 462, 463 (2d Cir. 1965), *cert. denied*, 382 U.S. 811 (1965), which in fact caused damage to them, *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F.2d 228, 238-40 (2d Cir. 1974).

In addition, the conclusory allegations that NQB committed common law fraud lack the necessary particularity and fail to state a cause of action under the applicable common law. As the New York Court of Appeals stated in *Jo Ann Homes* v. *Dworetz*, 25 N.Y. 2d 112, 119, 302 N.Y.S. 2d 799, 803, 250 N.E. 2d 214, 217 (1969), in order to sustain an action in common law fraud "There must be a representation of fact, which is either untrue or known to be untrue or recklessly made, and which is offered to deceive the other party and to induce them to act upon it, causing injury." Here, petitioners' amended complaint fails to allege any of the necessary elements for a cause of action in common law fraud.

In summary, the courts below clearly applied the relevant authorities and dismissed the allegations of securities law and common law fraud by NQB.

CONCLUSION

In short, the Petition raises no issue worthy of this Court's consideration. The decisions of the District Court and Court of Appeals are eminently sound, consistent with the holdings of this Court, and present no conflicts with decisions of other courts of appeals.

For all of the foregoing reasons, the Petition for writ of certiorari should be denied.

Dated: August 18, 1976

Respectfully submitted,

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Affidavit of Service

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

REX W. MIXON, JR., being duly sworn, deposes and says that, pursuant to Rule 33 of the Supreme Court Rules, he served the foregoing Brief upon counsel of record for each party by mailing on August 18, 1976, three true and correct copies thereof, first class mail postage prepaid, to Samuel H. Sloan, Petitioner *pro se,* 917 Old Trents Ferry Road, Lynchburg, Virginia 24503; Thomas L. Taylor, III, Esq., Securities and Exchange Commission, 500 North Capitol Street, Washington, D.C. 20549; Solicitor General, Department of Justice, Washington, D.C. 20530; Lloyd J. Derrickson, Esq., Robert J. Woldow, Esq., Jeffrey M. Silow, Esq., 1735 K Street, N.W., Washington, D.C. 20006; and Patricia Anne Williams, Esq., Willkie, Farr & Gallagher, One Chase Manhattan Plaza, New York, New York 10005.

/s/ REX W. MIXON, JR.
Rex W. Mixon, Jr.

Sworn to before me this
18th day of August, 1976.

.....
Notary Public